

Commentary:

The Role of the Organized Bar in Promoting an Independent and Accountable Judiciary

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The organized bar has a long history of promoting an independent and accountable judiciary. Lawyers and judges have led efforts to improve judicial selection methods, establish codes of conduct and ethics, and promote public trust and confidence in the judiciary. Judicial independence is threatened by increasingly expensive and partisan judicial elections in the states and legislative attempts to restrict the jurisdiction and funding of the courts. Bar associations must explore creative approaches to promoting a more diverse judiciary, adequate funding of courts, and respect for the judiciary as a separate and co-equal branch of government.

I. INTRODUCTION

Members of the legal profession have a unique and abiding interest in an independent and accountable judiciary. American lawyers have been promoting judicial independence since the founding of the Republic. Twenty-four of the fifty-six men who signed the Declaration of Independence were lawyers and jurists.¹ Lawyer and founder John Adams wrote a declaration of rights in the Constitution of the Commonwealth of Massachusetts of 1780 providing in part that:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.²

Lawyers and judges played key roles in the development of Article III of the United States Constitution and the judicial articles of the other twelve original state constitutions as well. Organized efforts to promote an independent judiciary were core functions adopted by bar associations as they formed nationwide.³

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¹ Ralph Wilson, *Signers of the Declaration of Independence*, ROBERT MERRY'S MUSEUM, Mar. 1859, at 69, available at <http://www.merrycoz.org/museum/SIGNERS.HTM> (last visited Jan 12, 2003).

² MASS CONST. pt. 1, art. XXIX (1780).

³ See, e.g., New York State Bar Association Constitution, 1877; Virginia State Bar Association Charter, 1890; Ohio State Bar Association Constitution, 1880. All name the

Lawyers and judges have also taken the lead at the state and federal levels in designing and administering rules and programs to promote accountability of judges to the public they serve. Bar polls, judicial performance evaluation programs, and codes of conduct and ethics for judges are just a few examples of the means by which lawyers seek to temper the independence of the judiciary with a healthy and appropriate dose of accountability.

II. THE MOTIVATION FOR PROMOTING JUDICIAL INDEPENDENCE

The motivation for lawyers to promote judicial independence might initially seem self-evident. Because most states now require all judges to hold law degrees, lawyers have an obvious and uncomplicated motivation for promoting a strong and independent judiciary. The cynical observer or critic of the legal profession, however, might question the notion that individual practitioners of the law truly desire impartial judges. After all, lawyers are the largest contributors to state judicial campaigns and have the greatest vested economic and professional interest in the outcome of cases. While it is certainly true that competing segments of the bar use substantial financial and political resources to influence the election or appointment of judges in some jurisdictions, the profession as a whole realizes that achieving success in a few cases through the manipulation of a partial judiciary would be a Pyrrhic victory in a rigged game. A lawyer celebrating a favorable outcome courtesy of a "friendly" judge would be just as likely to face an "unfriendly" judge in the next case. As a profession, lawyers recognize this and are therefore able to set aside personal and economic interests in the collective pursuit of a judiciary that gives all advocates and parties a full and fair hearing.

Lawyers must also convince clients that a fair hearing awaits, no matter what form the final outcome takes. The integrity of the judicial process and the ability of lawyers to attract and retain clients ultimately hinge upon clients' faith in the neutrality of the adjudicators—whether it is manifested through settlement conference evaluations or procedural and evidentiary rulings at trial. Without that faith, clients or aggrieved parties are less likely to avail themselves of the courts and more likely to seek out private forms of dispute resolution, or in the extreme, vigilante justice.

Finally, lawyers enhance their standing in the community at large by ensuring that judges are not only fair and impartial in fact, but are perceived to be fair and impartial by the many publics the courts serve, directly and indirectly. If justice is administered in a biased or corrupt manner, the reputations of both lawyers and judges suffer. Lawyers also recognize that without the power of purse or sword,

improvement of the administration of justice and the advancement of the science of jurisprudence as primary goals.

the judiciary relies on public trust and confidence to assure compliance with its rulings. Public confidence relies upon a judiciary of high integrity.

III. HOW BAR ASSOCIATIONS PROMOTE INDEPENDENCE AND ACCOUNTABILITY

Bar associations at the national, state and local levels have developed policies and programs that reflect the general consensus within the legal community as to the fundamental characteristics of an able and impartial judge, including sufficient legal experience, suitable judicial temperament, and commitment to fairness in the judicial process. In addition to conducting professional, nonpolitical evaluations of nominees for the federal judiciary for the past fifty years, the American Bar Association offers a number of models to promote independent and accountable state judiciaries. In its 1997 report, the ABA Commission on the Separation of Powers and Judicial Independence found that the greatest threats to judicial independence occur not at the federal level, but in the states.⁴ Politically motivated calls for impeachment of federal judges based on single decisions are certainly not benign and can have a chilling effect on the federal judiciary. The ABA Commission found, however, that the greater insulation from political influences enjoyed by sitting federal judges makes threats posed to the independence of state judiciaries comparatively more serious. Increased threats to state judiciaries observed in recent years include organized attempts to manipulate the selection of judges, influence judicial decision-making, and infringe upon the jurisdiction and funding of courts.

Manipulation of judicial selection processes may be as old as the hills, but the dramatic increase in interest group expenditures in recent judicial election cycles represents a shift in the fundamental character of judicial elections from low-budget, low-salience affairs to well-funded, high-profile political contests featuring negative television advertising.⁵ Similarly, statements by politicians and others designed to influence judicial decisions are nothing new, but the brazen intimidation of judges and the imposition of strict litmus tests on judicial aspirants also represent a more overtly political approach to influencing the state judiciaries.⁶ And while examples of successful and failed legislative attempts to

⁴ AM. BAR ASS'N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE viii (1997), *available at* <http://www.abanet.org/govaffairs/judiciary/r6c.html> (last visited Jan. 12, 2003).

⁵ See, e.g., DEBORAH GOLDBERG, THE NEW POLITICS OF JUDICIAL ELECTIONS 4-5 (2002); Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669 (2002) (examining the growth of and the effects of television advertising in judicial elections).

⁶ Two examples of gubernatorial infringements on judicial independence are illustrative. Following the retention election defeat of Tennessee Supreme Court Justice Penny White in 1996, Governor Don Sundquist, who publicly called for White's defeat remarked immediately after the election: "Should a judge look over his shoulder [in making decisions] about whether

curb the independence of state judiciaries can be found throughout American history, recent legislative dissatisfaction with court rulings in politically-charged cases has led to a spate of proposals to "reign in" judiciaries in states such as Florida,⁷ New Hampshire⁸ and North Carolina.⁹

The organized bar has responded to these threats to judicial independence in a number of ways. State bars have launched effective public education campaigns on the importance of an independent judiciary. For instance, in 1998 the Tennessee Bar Association produced a set of radio public service announcements guiding listeners to a website containing evaluations of judges standing for retention and information on the roles and responsibilities of state judges.¹⁰ The Missouri Bar recently produced a general interest video program on judicial independence that was distributed statewide and shown on public television.¹¹ The Florida Bar has partnered with the Florida League of Women Voters and the Florida Law Related Education Association to create a curriculum on judicial independence for high school students.¹² And the Judiciary Relations Committee of the State Bar of Texas in partnership with the Law Related Education Department of the Texas State Bar implemented, in 2002, a comprehensive program designed to enhance understanding of the United States Constitution and Supreme Court case law interpretation among high school students.¹³ The bar has

they're going to be thrown out of office? I hope so." Paula Wade, *White's Defeat Poses a Legal Dilemma: How Is a Replacement Justice Picked?*, MEMPHIS COM. APPEAL, Aug. 3, 1996, at A1. On February 29, 2000, California Governor Gray Davis stated: "My [judicial] appointees should reflect my views. They are not there to be independent agents." Davis suggested that judges who do not "keep faith with the representations that I made to the electorate" should resign. *Davis Wants His Judges to Stay in Line: He Says They Should Quit if Views Change*, S.F. CHRON., Mar. 1, 2000, at A5.

⁷ Jackie Hallifax, *Legislature: Senate Advances JNC Compromise*, NAPLES DAILY NEWS, May 4, 2001, at <http://www.naplesnews.com/01/05/florida/d630738a.htm> (reporting on modification to judicial merit selection system that gave the Florida governor the power to appoint all members of judicial nominating commissions).

⁸ John DiStaso, *House Vote Could Limit Court's Authority over School Funding*, UNION LEADER (Manchester, NH), Jan. 14, 2002, at A1; Tom Fahey, *Amendment Lets Lawmakers Review Court Rules*, UNION LEADER (Manchester, NH), Apr. 18, 2002, at A8.

⁹ Wade Rawlins, *Map-making Judges' Budgets Axed*, RALEIGH NEWS & OBSERVER, June 13, 2002, at A1.

¹⁰ Catherine Trevison, *Bar Group Hopes Radio Ads Guard Judges Against Attacks*, NASHVILLE TENNESSEAN, Feb. 4, 1998, at 1B.

¹¹ Videotape: *Loitering Around the 21st Century—Our Courts and the Significance of Judicial Independence* (The Missouri Bar 2001).

¹² FLA. LAW-RELATED EDUC. ASS'N, JUDICIAL INDEPENDENCE: UNDERSTANDING THE COURTS AND THE CONSTITUTION (2001), available at <http://www.flrea.org/JI%20Aug%2027.pdf> (last visited Jan. 12, 2003).

¹³ JUDICIARY RELATIONS COMM., STATE BAR OF TEX., WHAT'S UP WITH MY RIGHTS? (CD-ROM, 2002), available at <http://www.texasbar.com/globals/tbj/dec02/priestner.asp> (last visited Jan. 12, 2003).

also taken the lead in responding to unfair criticism of the judiciary, with over half of all state and local bar associations adapting an American Bar Association model for promptly issuing public statements when such situations arise.¹⁴

The American Bar Association has promulgated a host of policies and models that seek to strike an appropriate balance between judicial independence and accountability. A few examples include the Model Code of Judicial Conduct (revised 1990), Guidelines for Judicial Performance Evaluation (1985), Standards on State Judicial Selection (2000) and Report of the Commission on Public Financing of Judicial Campaigns (2002).¹⁵ The latter two restate the ABA's long-standing support for merit-based appointment of judges, while acknowledging the need to improve existing judicial election systems. Many of these models have been adopted or adapted widely by the states, such as the ABA Model Code of Judicial Conduct.¹⁶ Other newer models and recommendations, such as those on public financing, are gaining the support of bar associations and reform organizations in the states.¹⁷

The decision of the Supreme Court of the United States in *Republican Party of Minnesota v. White*,¹⁸ which strikes down the "announce clause" prohibiting judicial candidates from discussing their views on disputed legal or political issues, will almost certainly lead to even more politicized judicial campaigns in the states. In the wake of the *White* decision, the ABA has embarked upon a preliminary re-examination of the political speech provisions of the Model Code of Judicial Conduct. In addition, the ABA has adopted a recommendation calling on state and local bar associations to form judicial campaign conduct committees to encourage candidates to maintain high standards of discourse.¹⁹ The report accompanying the ABA recommendation identifies the need to involve non-lawyers in efforts to encourage appropriate judicial campaign conduct. Bar associations nationwide are increasingly cooperating with civic groups and

¹⁴ Twenty-seven of the fifty state bar associations report having programs to respond to unjust criticism of judges, while 19 of 36 local bar associations having more than 2,000 members report such programs. ABA DIV. FOR BAR SERVS., 2001 BAR ACTIVITIES INVENTORY 365-69 (Joanne O'Reilly ed., 2002).

¹⁵ All official policies adopted by the American Bar Association are cataloged and summarized in AM. BAR ASS'N, HANDBOOK OF POLICIES AND PROCEDURES 2002-2003 (2002).

¹⁶ With the 2002 revision of the Idaho Code of Judicial Conduct, all fifty states model their codes of judicial conduct substantially on the ABA Model Code. See generally JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (3rd ed. 2001).

¹⁷ The Judicial Campaign Reform Act, 2002 N.C. Sess. Laws 158, signed into law by North Carolina Governor Mike Easley on October 10, 2002, provides for a voluntary public financing system for North Carolina Supreme Court and Court of Appeals elections and makes those elections nonpartisan. In addition, since 2001, bills to create public financing systems for state supreme court elections have been introduced in Illinois, Texas, and Wisconsin.

¹⁸ 530 U.S. 765 (2002).

¹⁹ ABA House of Delegates, Report 113 (Aug. 12, 2002), available from ABA Standing Committee on Judicial Independence, 541 N. Fairbanks Court, Chicago, Illinois 60611.

community leaders to expand the reach of their public messages; the ABA strongly supports greater cooperation between the bench, bar and public.

IV. CONCLUSION: CHALLENGES AND OPPORTUNITIES FACING THE BAR

The bar faces a number of challenges and opportunities in its future efforts to promote an independent and accountable judiciary. First and foremost, young lawyers and law students can play leadership roles by serving on bar committees, educating colleagues and non-lawyers on the importance of judicial independence, lobbying the legislature for adequate judicial salaries and overall funding of court systems, and rising to the defense of the judiciary when it is unfairly criticized. Judicial independence issues have received unprecedented attention and funding over the past six years; the commitment of the next generation of bar leaders to these issues will ensure a continuation of the national dialogue on the roles and responsibilities of judges in our society. The ABA Young Lawyers Division has demonstrated its commitment through the formation of a Committee on the Future of the Judiciary, and the 6th Circuit Law Student Division has held a symposium on judicial independence. Young lawyers and law student divisions of state and local bars are encouraged to take advantage of the resources available from the ABA Standing Committee on Judicial Independence.

Bar associations must explore creative approaches to promoting judicial independence. The formation of partnerships between the bar, bench, media and civic groups will multiply the effectiveness of public education efforts. For instance, most bar associations in elective states conduct bar polls or form committees to evaluate the qualifications of judicial candidates. Despite their best efforts to disseminate evaluation information to the public, the limited resources of bar associations make it difficult to reach a substantial portion of the voters. By pooling resources with civic groups and seeking distribution agreements with newspapers, or ideally, including evaluation results in state-sponsored voter guides, bar associations can be more confident that voters are receiving the information they need to make informed choices at the polls. Inviting non-legal organizations to play an active role in promoting judicial independence and improving the administration of justice also helps to build a public constituency for the courts that can lay the foundation for vastly improving judicial branch budgets, legal assistance programs, and ultimately a better understanding of the role of the courts. The ABA Coalition for Justice works to facilitate greater collaboration between the bench, bar, and civic groups; bar associations interested in expanding their outreach to various public constituencies can draw upon a wealth of models and resources from the Coalition.

The efforts discussed above hold promise, yet their effectiveness will be diminished if the bench and bar do not adequately reflect the people they serve. Bar associations have aggressively pursued strategies to diversify the profession

and the judiciary; these efforts must remain at the forefront of every bar association's agenda. And while significant strides have been made to improve the representation of women and people of color, much more remains to be done. For the long-term health of the legal profession and the judiciary, to promote public trust and confidence in the courts, and most importantly, to ensure equal justice for all, the bar must lead the way in making the justice system a more accurate reflection of our society.

